No. 16361

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFONSO ESPINOZA COVARRUBIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for
the Southern District of California
Southern Division

HOWARD R. HARRIS
936 San Diego Trust & Savings Bldg.
San Diego 1, California

Attorney for Appellant

Printed by San Diego Offset Printing Co., 930-8th Ave. - BElmont 2-2126

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

COURT RULES

STATUTES

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I

STATEMENT OF FACTS

On May 8, 1958, an indictment was returned by the United States Grand Jury, Southern District of California, Southern Division, charging appellant Alfonso Espinoza Covarrubias and Rachel Lopez Ybarra Covarrubias with smuggling of 9-1/2 pounds of marijuana

into the United States from Mexico at the Port of San Ysidro, California, in violation of 21 U.S.C. 176(a) (Cl. Tr., p. 2). On May 19, 1958, the appellant and defendant Rachel Covarrubias were arraigned in the United States District Court, Southern District of California, Southern Division, at San Diego, California, and entered pleas of not guilty (Cl. Tr. p. 4). The matter came on for trial on June 29, 1958, before the Honorable William G. East. Defendant Rachel Covarrubias changed her plea to that of guilty. The trial of appellant was commenced on that date (Cl. Tr. p. 7). At the close of the Government's case, appellant made a motion for Judgment of Acquittal (Cl. Tr. p. 8, Rep. Tr. p. 42, 43). The motion was denied (Cl. Tr. p. 8, Rep. Tr. p. 50). On July 30, 1958, before submission of the case to the jury, appellant again made a motion for Judgment of Acquittal. The motion was denied (Cl. Tr. p. 9, Rep. Tr. p. 63). On July 30, 1958, appellant was found guilty (Cl. Tr. p. 11). Appellant was sentenced to the custody of the Attorney General for a period of five years (Cl. Tr. 12).

On August 4, 1958, appellant filed a motion for Judgment of Acquittal and in the alternative for a New Trial (Cl. Tr. p. 14). On August 15, 1958, the motion for judgment of acquittal and in the alternative for a new trial was heard by the court. On August 18, 1958, the court orally denied said motion (Motion for New Trial, Tr. pp. 2-11). On September 11, 1958, the court entered a formal order denying the alternative motion (Cl. Tr. p. 18). Notice of Appeal was filed August 25, 1958 (Cl. Tr. p. 16, 17). Said appeal was from the Judgment of Conviction dated July 30, 1958. Supplemental Notice of Appeal was filed September 15, 1958. By the supplemental notice appellant appealed

from the Order denying the Alternative Motion (Cl. Tr. p. 21).

The evidence in the case was substantially as follows: Appellant returned to the United States from Mexico on March 29, 1958, in a 1955 Buick automobile (Rep. Tr. p. 6). Co-defendant, Rachel Covarrubias, appellant's wife, was with him (Rep. Tr. p. 7). Both declared that they were not bringing any merchandise back from Mexico (Rep. Tr. p. 7, 8). At the request of the Customs Inspector, appellant opened the trunk to the automobile. The trunk was locked and had to be opened with a key (Rep. Tr. p. 17). Appellant was directed to a secondary inspection point (Rep. Tr. p. 9). The car was on a Customs' lookout list. (Rep. Tr. p. 11). A second Customs Inspector removed the spare tire from the trunk of the automobile and let the air out. He rolled it slowly along the pavement. He "felt a small thud" (Rep. Tr. p. 23). He took the tire to a Standard gasoline station close by where the tire was removed from the wheel and certain white packages obtained therefrom (Rep. Tr. p. 24). These packages were marked Government's Exhibits 3, 4, 5 and 6. Samples were taken from these exhibits and sent to the United States Customs Chemist for analysis. Upon examination they were found to contain marijuana (Rep. Tr. p. 40, 41).

Appellant took the witness stand and testified substantially as follows: That he did not knowingly smuggle marijuana into the United States. His wife had access to and the use of his automobile. His wife's brother, one Fred Navarra, had access to and the use of his automobile (Rep. Tr. p. 54). On cross-

examination appellant testified that he arrived in Tijuana early in the morning on the 29th of March about 1:00 A.M. He left his wife and children at a hotel. From 1:00 A.M. to 6:00 A.M. he walked around and drove his automobile. He went to his brother's home in Tijuana about 6:00 A.M. in the morning. He remained at his brother's house about one hour. He had his automobile with him at that time. He and his brother then went back to the hotel in the automobile. His wife and brother left the hotel. Appellant went to sleep about 7:00 A.M. at the hotel and slept to 11:00 A.M. or noon. About 11:00 A.M. or 12:00 noon appellant's wife returned. Appellant went out to see his brother again but did not take the automobile. Appellant returned to the hotel about 2:00 or 3:00 in the afternoon. Appellant's wife was not at the hotel when he returned. She arrived back at the hotel about 4:00 P.M. Upon her arrival, appellant and his family got into the automobile and came back into the United States. The automobile is registered to appellant and his wife, defendant Rachel Covarrubias. After crossing the line appellant was arrested. He had $16.00 with him at the time of his arrest. When he left his home at Stanton, California, he and his wife had $138.00 (Rep. Tr. pp. 55-59). On redirect examination appellant testified that his wife was carrying the money when they went to Tijuana.

II

STATEMENT OF JURISDICTION

Reference is made to the first two paragraphs of the Statement of Facts, supra.

The indictment was returned pursuant to Rule 7 Federal rules of Criminal Procedure. San Ysidro, California, where the act was charged to have taken place, is within the Southern Division of the Southern District of California; thus the trial court had jurisdiction under Rule 18 of said Rules. This appeal was taken pursuant to Rule 37 of said Rules.

III

STATEMENT OF ISSUES

The questions involved are two.

1 - Is there sufficient evidence to support the verdict? It is the contention of Appellant that the circumstantial evidence of appellant's supposed knowledge of the presence of marijuana is insufficient to sustain the guilty verdict. This point was raised during the trial in the motion for Judgment of Acquittal at the close of the prosecution's case (Rep. Tr. pp. 42, 43), at the close of all the evidence (Rep. Tr. p. 63), and during the motion for new trial (Motion for New Trial pp. 2-11).

2 - Did the court err in sustaining the prosecution's objection to a question pertaining to the narcotics record of a person having access to the automobile in which the marijuana was found?

Appellant was asked who besides himself and his wife, had access and use of his automobile. He stated a brother of his wife, one Fred Navarra. He was asked "and has he been convicted of possession of narcotics?" The objection was sustained. (Rep.

Tr. p. 54).

The relevance of this question was discussed in detail during the motion for new trial (Motion for New Trial Tr. pp. 5, 6) as follows: ".... I, in order to show, possibly, who could have had possession and control of the narcotics, asked on cross-examination, ..." (the above question.) "Now, I think that that deprived us of what some of these cases seem to indicate, that if the narcotics are found and if the person is found in close proximity to the narcotics, has had a narcotics conviction, that that is a circumstance tending to show his possession . . . so I think it was important, your Honor. And I think it may have been error to sustain that objection."

The foregoing specifications are the errors upon which the appellant relies.

IV

ARGUMENT

A. The circumstantial evidence of the appellant's supposed knowledge of the presence of the marijuana is insufficient to sustain the conviction.

In the instant case the government relies on the statutory presumption arising from possession (21 U.S.C. 176-a). We submit that there is insufficient evidence in the record to establish that appellant had possession of the marijuana, that is, that he knew of the presence of the marijuana and had control of it;

thus such presumption is not applicable. There can be no possession without knowledge.

Guevara vs. U. S. (5 Cir.) 242 Fed. 2 745
Evans vs. U. S. (9 Cir.) 257 Fed. 2 121
U.S. vs. Tijerina (D.C. Tex) 138 Fed. Supp. 759

The circumstantial evidence in the case to establish knowledge and control is as follows: Appellant entered the United States from Mexico. He was driving a car owned by himself and his wife. The trunk compartment of the automobile was locked. The contraband was found in the spare tire which had been inside the trunk compartment. Besides appellant, two other persons had access to the automobile, which automobile was owned by appellant and his wife. In addition, the co-defendant, appellant's wife, pleaded guilty to the instant offense.

It is submitted that the foregoing evidence viewed in the light most favorable to the prosecution is not sufficient to establish knowledge. Appellant's wife, by her plea of guilty has admitted knowledge and possession of the marijuana. There is nothing in the evidence from which it may be reasonably inferred that appellant knew of the marijuana. Such inference could only arise from surmise, conjecture and speculation.

In Guevara vs. U. S. (5 Cir.) 242 Fed. 2 745, the defendant was charged with two counts under the Marijuana Tax Act. (26 U.S.C. 4744a). The defendant was convicted and the motion for judgment for acquittal following conviction was denied. The facts were substantially as follows:

A member of the police department of El Paso had seen defendant walking along the street and enter a hotel in El Paso, remain there ten minutes and come out. Defendant then met another man. The other man and defendant got into the front seat of an automobile which was not locked. The officer maintained surveillance of the two for three and a half blocks. Both persons were arrested. At the police station the car was searched. A package of 15 marijuana cigarettes was found on the floor under the seat in the middle of the car. Also a billy club was found under the seat. The defendant admitted ownership of the club but not the cigarettes. The other man was released. The Court of Appeals reversed the conviction. It was the opinion of the Court that it was just as reasonable that the cigarettes belonged to the other man as the defendant. "A jury must not be left to speculate and surmise in a criminal case, merely hoping that they are drawing the proper inference." (242 F. (2) 747).

In Rodrigues vs. U. S., 232 Fed. (2) 819, another Marijuana Tax Act case, defendant Rodriguez was charged with two counts. He was acquitted on the first count and convicted on the other. A co-defendant had plead guilty and accepted full responsibility for the marijuana referred to in the second count. The Court of Appeals reversed the conviction. It appeared that defendant led the agent to the marijuana only after the co-defendant had given instructions to the defendant in the presence of the agents as to where to find the marijuana. It was found on defendant's premises at the rear of the house. The court stated that conviction rested on "surmise and suspicion."

The Court stated:

"The authorities are clear that circumstantial evidence may, of course be sufficient to convict. Nevertheless, because of the fact that it is circumstantial and that a grave wrong may be done to an innocent man by reasoning from circumstances not sufficiently cogent in themselves or as connected, and particularly not sufficiently exclusive of every innocent hypothesis, the courts have been very sedulous to prevent an innocent man being found guilty where the evidence does not conform to acceptable standards." (232 F. (2) 821).

See also U. S. vs. Maghinang (D.C. Del) 111 Fed. Supp. 760.

A late 9th Circuit Case, Evans vs. U. S. 257 F (2) 121, opinion by Justice Hamley, concerned the question of when knowledge of the presence of marijuana could be inferred from possession of the premises containing marijuana. The defendant in that case was charged with a violation of the Marijuana Tax Act (26 U.S.C. 4744a). The defendant was arrested pursuant to warrant at premises located on Broderick Street. Evidence pertaining to the third count was as follows: Search of the premises resulted in finding 22 grains of marijuana. The apartment was occupied by Evans' paramour, Mildred. It turned out that the apartment was hers and defendant stayed there only on occasion. Mildred denied ownership of the marijuana and Evans, under questioning, gave an equivocal answer. At the trial Evans testified that he did not know the marijuana was there. He was convicted on all counts. The Court of Appeals affirmed the conviction. However the court stated in discussing the evidence on

the third count that:

> "Proof that one had exclusive control and dominion over property on or in which narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics and control thereof..... Where one has exclusive possession of a home or apartment in which narcotics are found, it may be inferred even in the absence of other incriminating evidence that such person knew of the presence of narcotics and had control of them. ..... But, since he was not in exclusive possession of the premises, it may not be inferred that he knew of the presence of narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference." (257 F. (2) 128).

In the Evans case the Court of Appeals stated that there were such additional statements and circumstances - the implied admission and the disclaimer of Mildred at the time of the finding of the narcotics.

A California case, People vs. Antista (276 P. 2d. 177, 129 Cal. App. 2d 47), was relied on by the Court of Appeals in the Evans case. The facts in the Antista case were very similar to those of the Evans case. The paramour in the Antista case had previously been convicted of the use of narcotics. The Court discussed the cases where the possession of an automobile or apartment were not exclusive and stated that there must be some incriminating statement or circumstance in addition to the presence of the narcotics which indicated

knowledge of the defendant of its presence. Where this additional fact orcircumstance is not established the prosecution has not established its case. Even though it be a fact that the Court disbelieves the defendant in his denial of knowledge of the presence of the marijuana, such fact does not supply the missing element.

> "The burden was on the State to prove facts from which knowledge could thoroughly be inferred."

The Judgment in the Antista case was reversed.

In the instant case there is one possible additional circumstance: appellant was married to co-defendant Rachel Covarrubias who plead guilty to the charge. To make any inference of knowledge from this fact is not warranted. Guilt may not be inferred from association. Ong Way Jong vs. U. S. 245 Fed. 2, 392, 394. Nor may guilt be inferred from "relation".

In the instant case the appellant was not in exclusive possession of the automobile. Appellant's wife jointly owned the car and had access to the automobile. Also her brother had access to the automobile. We submit the evidence was insufficient.

B. The court erred in sustaining the objection to the question as to the narcotics record of a person having access to the automobile in which the marijuana was found.

The court sustained the objection to the question as

to the narcotics record of appellant's brother-in-law. Evidence as to who used the automobile is relevant and material. Evans vs. U.S. 257 Fed. (2) 121.

If appellant had had exclusive possession of the automobile, the government could establish that fact. Similarly, the defense is able to introduce evidence to show the possession was not exclusive.

Had appellant previously been convicted of a marijuana charge, even though not a felony, he could have been asked questions concerning this conviction to show his familiarity with marijuana (Stein vs. U.S., 166 Fed. (2) 851; Wright vs. U. S. 192 Fed. (2) 595). We think it only fair that where another person, who had access to the automobile, has familiarity with marijuana, that fact may also be shown.

In People vs. Antista, 276 P. 2d 177, 129 Cal. App. 2d 47, the California District Court of Appeal emphasized the fact that, where another person had access to an apartment or automobile and such person was addicted to or used narcotics, that is a circumstance which should be considered by the trier of fact.

CONCLUSION

In brief, the government's case is that appellant was in the non-exclusive possession of an automobile containing marijuana. No additional incriminating facts or circumstances appear to show appellant's knowledge of the presence of marijuana. Appellant may or may not have known of the presence of the marijuana. The evidence of the prosecution provides no

reasonable legal inference as to which situation is true. This being the posture of the evidence in this case, judgment should be reversed with directions to the trial court to grant a motion for judgment of acquittal.

Respectfully submitted,

HOWARD R. HARRIS
Attorney for Appellant